

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CARMEN ORTIZ,

Plaintiff,

v.

Civil. No. 02-1000 WJ/RLP-ACE

CID'S FOOD MARKET, INC.,
a New Mexico Corporation, and
ROBERT E. BACKER,

Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING
PLAINTIFF'S MOTION TO AMEND COMPLAINT**

THIS MATTER comes before the Court pursuant to Plaintiff's Motion to Amend Her Complaint to Include a Count of Defamation [Docket No. 52]. Having reviewed the submissions of the parties and the applicable law, I find the motion is well taken and will be granted.

Plaintiff filed her Complaint in this matter on August 13, 2002. On October 7, 2002, the parties filed the Provisional Discovery Plan [Docket No. 10]. The Initial Pre-Trial Report was entered on October 28, 2002 [Docket No. 14]. The deadline for the amendment of pleadings was set forth as January 31, 2003. On February 13, 2003, the New Mexico Bar Bulletin published an advance opinion from the Court of Appeals of the State of New Mexico affecting the tort of defamation and its affirmative defenses.

Requests for leave to amend pleadings should be liberally granted. Fed. R. Civ. P. 15. Leave to amend pleadings may be denied when the amendment is untimely or when the amendment would be futile. Bauchman v. West High School, 132 F.3d 542, 559 (10th Cir. 1997). Defendant opposes plaintiff's motion to amend arguing that the motion to amend is

untimely and that the amendment would be futile.

I find that plaintiff did not unduly delay her request to amend considering the basis of the proposed amendment was a recent New Mexico Court of Appeals opinion. Accordingly, Plaintiff has provided sufficient explanation to the Court for the timing of the request.

A proposed amendment is futile if the counterclaim, as amended, would not survive a motion to dismiss or motion for summary judgment. Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Serv., Inc., 175 F.3d 848, 859 (10th Cir. 1999). I cannot say that, as a matter of law, the proposed amendment would be subject to dismissal. Therefore, the amendment is not futile.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Amend Her Complaint to Include a Count of Defamation [Docket No. 52] is hereby GRANTED.



UNITED STATES DISTRICT JUDGE